(4)

No. 00-1012

FILED

MAR 5 2001

CLERK

IN THE

Supreme Court of the United States

KARUK TRIBE OF CALIFORNIA, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

ROBERT S. VENNING
HELLER EHRMAN WHITE
& MCAULIFFE LLP
333 Bush Street
San Francisco, California 94104
(415) 772-6000

WILLIAM A. NORRIS
EDWARD P. LAZARUS
AKIN, GUMP, STRAUSS,
HAUER & FELD, L.L.P.
2029 Century Park East
Suite 2600
Los Angeles, California 90067
(310) 229-1000

WILLIAM C. WUNSCH
Counsel of Record
FAULKNER, SHEEHAN & WUNSCH
351 California Street
San Francisco, California 94104
(415) 362-6340

MARTIN S. PUTNAM
LAW OFFICE OF MARTIN PUTNAM
484 Lake Park Avenue
Oakland, California 94610
(510) 893-6214

Attorneys for Petitioners

(Additional counsel listed on inside front cover)

16 pp

JOHN R. SHORDIKE
CURTIS G. BERKEY
ALEXANDER & KARSHMER
2150 Shattuck Avenue, Suite 725
Berkeley, California 94704
(510) 841-5056

DENNIS J. WHITTLESEY
JACKSON & KELLY PLC
2401 Pennsylvania Avenue, N.W., Suite 400
Washington, DC 20037
(202) 973-0200

Attorneys for Petitioners

TABLE OF CONTENTS

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION 1

I. The Petition Presents a Clear Issue of Principle 1

II. Reply to Specific Points Raised in Opposition 4

A. Respondents Mischaracterize the Procedural Posture of the Case 4

B. The Executive's Power to Enlarge the Reservation Does Not Determine the Issue of Compensability 5

C. The Issue Presented Has Not Yet Been Decided 7

D. Attempts to View This Reservation in Isolation Are Misplaced 9

III. CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Andrus v. Allard,
444.U.S. 51 (1979).....4

Coast Indian Community United States,
550 F.2d 639 (Ct. Cl. 1977).....6

Donnelly v. United States,
228 U.S. 243 (1913).....3, 7, 9

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998).....4

Hodel v. Irving,
481 U.S. 704 (1987).....4

Hynes v. Grimes Packing Co.,
337 U.S. 86 (1949).....1, 3, 9

Mattz v. Arnett,
412 U.S. 481 (1973).....7, 9

Northwestern Bands of Shoshone Indians v. United States,
324 U.S. 335 (1945).....3

Pechanga Band of Mission Indians v. Kacor Realty, Inc.,
680 F.2d 71 (9th Cir. 1982),
cert. denied, 459 U.S. 1171 (1983).....7

Short v. United States,
202 Ct. Cl. 870, 486 F.2d 561 (1973),
cert. denied, 416 U.S. 961 (1974).....9

Sioux Tribe v. United States,
316 U.S. 317 (1942).....8

Tee-Hit-Ton Indians v. United States,
348 U.S. 272 (1955) 1, 3, 9

United States v. Assiniboine Tribe,
428 F.2d 1324 (Ct. Cl. 1970) 6

United States v. Idaho,
95 F. Supp. 2d 1094 (D. Idaho 1998),
aff'd, 210 F.3d 1067 (9th Cir. 2000),
cert. granted (U.S. Dec. 11, 2000) (No. 00-189) 4

STATUTES

40 U.S.C. § 471 2

Hoopa-Yurok Settlement Act of 1988,
25 U.S.C. §§ 1300i-1 *et seq.* 8

MISCELLANEOUS

F. Cohen, *Handbook Of Federal Indian Law*
(2d ed. 1982) 8

No. 00-1012

IN THE

Supreme Court of the United States

KARUK TRIBE OF CALIFORNIA, *et al.*,
Petitioners,

—v.—

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

I. The Petition Presents a Clear Issue of Principle

Respondents assert that the petition does not "raise any question of widespread or recurring significance," U.S. Opp. at 12; *see* HVT Opp. at 4, but tacitly admit that this Court has never decided whether the Indians of reservations established by statute but defined through Executive order have property rights compensable under the Fifth Amendment. Respondents' arguments serve to confirm that the case raises this broad and important question, which has two significant parts. The first is whether the compensability of a reservation is affected by the authorizing statute's delegation to the Executive of authority to fix and expand reservation boundaries. The second concerns the appropriate standards for applying the broad language of such cases as *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) and *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949) to this category of reservations.

Respondents seek to minimize the significance of the question by contending that it calls for a case-by-case inquiry into congressional intent that is "insusceptible of a categorical answer." U.S. Opp. at 14; *see* HVT Opp. at 4. Yet respondents, in effect, give a categorical answer to the question by categorically denying the compensability of a reservation established under a statute that delegates to the executive the authority to fix and to expand reservation boundaries absent "specific granting language [that] recognizes compensable property rights." U.S. Opp. at 14; *see* Pet. App. at 18a. Respondents do not cite a single case in which a statute, in giving the Executive discretion to define the boundaries of a reservation, has at the same time included language explicitly vesting Fifth Amendment rights. It would be unusual to find one. A statute that gives to the Executive the power to dispose of federal lands would not in general be expected, redundantly, to exercise the very power delegated. *Cf.* 40 U.S.C. § 471 (federal surplus property statute delegates power to confer property rights but does not itself employ language of disposition or conveyance). Thus, while respondents purport to endorse the view that compensability requires a case-by-case inquiry, their argument, like the ruling below, effectively denies compensability to a large, distinct, and readily definable class of reservations. In essence, respondents' purported case-by-case approach defines as non-compensable *as a matter of law* the entire category under consideration.

Petitioners urge a different approach. In petitioners' view, when Congress authorizes the President to set up a permanent Indian reservation and the President does so, then absent indications that Congress or the Executive intended less,[1] the resulting reservation is protected by the

---

[1] The United States claims to find such indications in the 1864 Act, 13 Stat. 39, but its argument hinges on an elision. The statute provides that the territories are to be "retained by the United States for the purposes of Indian reservations," confirming the establishment of a permanent trust relationship. In summarizing the effect of the statute the government follows the lower court in cutting the phrase to "retained by the United States," effectively inverting the meaning. *See* U.S. Opp. at 10, 15; Pet. App. at 14a.

Fifth Amendment. The conclusion is only reinforced, and the result overdetermined, when the reservation survives long into an era when other federal rights of Indians are protected without regard to the historical origins of the reservations on which they reside. There is a large number of reservations in this group, and the question whether the Fifth Amendment protects their beneficial owners from uncompensated takings is an important one.

In sum, this case presents a clear choice between distinct legal rules for determining the Fifth Amendment compensability of reservations established by statute but defined by Executive order.[2]

The handful of passages cited by both respondents and petitioners from such cases as *Hynes*, *Tee-Hit-Ton*, and *Donnelly v. United States*, 228 U.S. 243 (1913), provide little guidance. None of these cases addresses a situation in which the Indians of a regularly-established reservation are dispossessed without compensation after generations of residence on the reservation. None addresses the legal effect, with respect to Fifth Amendment compensability, of the key factor in this case – Congressional delegation to the

---

[2] As with any legal rule, application may depend somewhat on the facts of a given case. But the necessity of a case-specific application of a general rule does not render a dispute about the content of the rule "factbound" and, thus, uncertworthy.

Both respondents challenge petitioners' observation that interests in reservations fully defined by statute or treaty are, as a rule, fully protected by the Fifth Amendment, but neither identifies a modern statutory or treaty reservation that was taken by the United States without compensation. The cases cited by respondents concern nineteenth-century reservations that were of short duration, were never fully defined, or both. *See* HVT Opp. at 6 nn.5, 7. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 348 (1945) does not, as the Hoopa Valley Tribe asserts, hold that a "treaty merely defining area was insufficient to confer a compensable interest"; in fact, the reservation at issue was never fully established or defined. The case lends no support to the suggestion that a general rule cannot be articulated to answer the Question Presented.

Executive of powers to delineate and expand reservation boundaries. None was decided since the Court's development of the "justice and fairness" standards of *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *Hodel v. Irving*, 481 U.S. 704 (1987), *Andrus v. Allard*, 441 U.S. 51 (1979), and similar cases. Generalized injunctions to look to the "language or purpose" of Congressional action provide no more than a starting point; standards governing relevant *categories* of cases are required to bring the issue to a non-arbitrary resolution.[3]

II. Reply to Specific Points Raised in Opposition

In a variety of ways, both the United States and the Hoopa Valley Tribe attempt to show either that the issues raised by the petition have already been decided by another court or that they are for one reason or another not of broad application. Respondents' arguments are without merit.

A. Respondents Mischaracterize the Procedural Posture of the Case

In seeking to tie the petition to non-recurring factors such as the terms of a particular statute, the government states the Question Presented in a way that fails to mesh with the case in its present procedural posture. According to the United States, the case presents the question "whether the Settlement Act effected a compensable taking of any property rights of petitioners." U.S. Opp. at (I). The difficulty with this formulation is that the effect of the Settlement Act is not before this Court. The Federal Circuit

---

[3] The government's insistence that guidance from the Court in this area is not required, U.S. Opp. at 12, is ironic in the light of the inconsistent positions that the government has taken in this case and in *United States v. Idaho*, 95 F. Supp. 2d 1094 (D. Idaho 1998), *aff'd*, 210 F.3d 1067 (9th Cir. 2000), *cert. granted* (U.S. Dec. 11, 2000) (No. 00-189), in the last three years on a related categorical question, namely whether all executive-order reservations have had the same recognized status as treaty and statutory reservations since 1887. *See* U.S. Opp. at 21 n.7 and cases cited; Pet. at 11 n.6; Pet. App. at 101a-120a. It should be emphasized that, in its present posture before this Court, the *Idaho* case does not squarely present the compensability issue that is at the core of this case.

decided the matter on summary judgment on a prior and more general ground, namely the compensability of the reservation. There is no record on the basis of which the Court *could* address the question proposed by the United States.

The question whether a particular statute effects a taking, and hence is an exercise of Congress's eminent-domain powers, or on the contrary is an act of guardianship that does not invoke such powers, is a question of fact. If the lower court majority's decision is reversed and the case remanded, the United States will presumably have an opportunity to try to demonstrate that, as a matter of fact, the Hoopa-Yurok Settlement Act did not effect a taking and was an act of guardianship. But the certworthiness of that question is not at issue here, though both respondents sometimes argue as though it were. Thus the government's ungrounded assertion that the HYSA was an act of guardianship, U.S. Opp. at 23, only distracts from the issues that bear on the granting of the writ. So too do respondents' lengthy and detailed characterizations of the purpose and effect of the HYSA.

B. The Executive's Power to Enlarge the Reservation Does Not Determine the Issue of Compensability

The elaborate syllogism that lies at the core of the United States' argument rests on an unargued premise: that, to be compensable, rights in a reservation must be incapable of "dilution" by executive actions adding other beneficiaries. U.S. Opp. at 16-17.

According to the United States, the modern Hoopa Valley Reservation is not compensable because, in 1891, when the government added land and beneficiaries to the original Hoopa Valley Reservation, it diluted the interests of the Reservation's initial beneficiaries without paying compensation. And if the initial beneficiaries had no compensable interest against dilution, the current beneficiaries have no compensable interest against dispossession by the United States.

The fundamental premise of the government's argument, however, is unsupported. The United States cites no authority, apart from the very case under review, that holds that an exercise of a right to dilute the interests of a reservation's beneficiaries licenses uncompensated appropriation of the reservation or its resources.

Indeed, as illustrated by the concededly compensable Uintah Reservation in Utah, *see* HVT Opp. at 6 n.4, the weight of authority tends to support the opposite view. That reservation, much like the reservation at issue in this case, was established subject to the reserved right of the United States to "[induce] . . .different tribes of said territory. . .to inhabit" the reservation. Courts have not found compensability to hinge on whether the Executive or Congress has reserved the right to move additional Indians or tribes to a reservation, and to that extent to "dilute" the interests of those who arrived first. *See Coast Indian Community v. United States*, 550 F.2d 639, 643-644 (Ct. Cl. 1977)(beneficial owners of land held in trust as an Indian reservation were designated over a period of years; those determined to be beneficial owners at the time of the taking were entitled to Fifth Amendment compensation); *United States v. Assiniboine Tribe*, 428 F.2d 1324 (Ct. Cl. 1970)(Indians who moved to reservation with acquiescence and assistance of United States over a period of time acquired vested rights in reservation).

Because rights can be subject to dilution and still be compensable, the government is mistaken that petitioners' position implies that the 1876 executive order setting apart the Square as a reservation must have been ineffective to create compensable rights, and it is also mistaken that petitioners' view implies that the Fifth Amendment implications of the 1891 order adding the Extension to the reservation must be different from and greater than those of the 1876 order. The 1891 order changed the size of the trust property and the membership of the class of trust beneficiaries, but that does not imply that it would necessarily have effected a "taking" of any "vested" interest held by Indians of the reservation as established in 1876. Still less does this sequence of events necessarily insulate the government from any constitutional obligation to provide

compensation for a taking of reservation property generations later. The starting-point for this chain of consequences is the government's premise that every dilution of a compensable interest is a compensable taking, but that premise is ungrounded in any decision of this Court.

C. The Issue Presented Has Not Yet Been Decided

The Hoopa Valley Tribe suggests that the 1864 Act had been held before this case not to give rise to constitutionally protected interests on the part of the trust beneficiaries of reservations established pursuant to it. None of the cases cited by the Hoopa Valley Tribe on this point – *Donnelly, Mattz v. Arnett*, 412 U.S. 481 (1973), *Pechanga Band of Mission Indians v. Kacor Realty, Inc.*, 680 F.2d 71 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983), or *Short* – addresses this constitutional question. The Hoopa Valley Tribe's argument confuses two questions. The first of these questions is whether any subgroup of Indians of the former Hoopa Valley Reservation had preferential rights, greater than those of other Indians of the Reservation, to revenues derived from a part of that reservation. That question was answered in the negative by the *Short* cases and is not presented by this case. A second and entirely different question, which is presented by this case, is whether United States can dispossess the reservation's beneficial owners, or some of them, without incurring an obligation under the Fifth Amendment to pay just compensation. The first question concerns the rights of one group of Indians vis-a-vis others; the second question concerns the scope of the constitutionally protected rights of all groups of Indians of the reservation vis-a-vis the United States. The court's holding that no group of Indians of the reservation had a superior interest to a particular portion of it does not answer the second of these questions.[4]

---

[4] Both respondents rely on report language that was produced in the context of the Hoopa-Yurok Settlement Act, for which the Hoopa Valley Tribe lobbied and in whose development the Hoopa Valley Tribe was intimately involved. U.S. Opp. at 8-9 n.2; App. at 1a-52a. In the report, the committee states its view that the Indians of the Hoopa Valley

It is simply not the case that "petitioners' theory was propounded in the *Short* litigation and expressly rejected by that court." *See* HVT Opp. at 13. The *Short* litigation concerned the first of these questions, not the second.

Nor was the issue presented by this case decided in *Sioux Tribe v. United States*, 316 U.S. 317 (1942), which concerned a reservation established without prior congressional authorization and hence falling outside the scope of the Question Presented. Furthermore, the *Sioux Tribe* reservation was expressly temporary. The United States minimizes the significance of the reservation's temporary character, U.S. Opp. at 21 n.7, but the *Handbook of Federal Indian Law* takes a different view:

> The Sioux Tribe decision sustained the revocation of particular executive order reservations by the President, but that case involved special circumstances. The reservations in question had been created only a few years prior to their revocation, and had been intended to serve only as temporary buffer zones against liquor traffic between reservation and non-reservation lands. *It seems unlikely that the same result would be reached involving a permanent executive order reservation of long duration.*[5]

Likewise, respondents place great weight on alterations in the area of reservations of this type more than a century ago. U.S. Opp. at 16; HVT Opp. at 10-11. Contrary to contentions of respondents, the question whether such early alterations affect the compensability of these

---

Reservation lacked compensable property rights in the reservation. *E.g.*, HVT Resp. App. 23a. Despite this, both the committee and the Justice Department recognized that the issue of compensability was open and for this reason provided shortened statutes of limitation for Fifth Amendment claims. HYSA, 25 U.S.C. § 1300i-11. In any event, the committee's conclusion on this question of law is not entitled to deference by this Court. Congress could not, by an *ipse dixit*, avoid a *constitutional* duty to compensate by defining the property taken as non-compensable.

[5] *Handbook*, Ch. 9A, text preceding n.188 (emphasis supplied).

reservations was not addressed in *Donnelly v. United States*, *supra*, and has not been decided by this Court.[6]

D. Attempts to View This Reservation in Isolation Are Misplaced

The Hoopa Valley Tribe seeks to portray the issue presented as a narrow one in part by asserting that the 1864 Act "pertains [only] to a single reservation in California." HVT Opp. at 4. In this the Hoopa Valley Tribe is mistaken. Both the Tule River Reservation and the Round Valley Reservation are presently existing 1864 Act reservations, *see, e.g., Mattz v. Arnett*, 412 U.S. at 493-94, and authorities cited, and any decision in this case has direct implications for them.

The significance of this case extends far beyond the scope of the 1864 Act, however. Numerous reservations that exist today were established by the Executive pursuant to statutory authorization and hence are within the scope of the question presented by this case. By their arguments, respondents implicitly concede that common factors make the compensability of the reservations in this group susceptible to unified analysis; they differ with petitioners not on this point but on the content of the analysis. Neither respondent seriously disputes that the compensability of the reservations in this group is an important open question of

---

[6] Respondents also characterize petitioners' arguments in ways that wrongly suggest that they run contrary to various settled principles. For example, both respondents suggest, mistakenly, that petitioners question or seek the overruling of *Donnelly*, *Tee-Hit-Ton*, *Hynes*, or even *Short v. United States*, 486 F.2d 561 (Ct.Cl. 1973), *cert. denied*, 416 U.S. 961 (1974), a case in which petitioners prevailed. It is not the case, as suggested by the Hoopa Valley Tribe, that petitioners seek to substitute a unilateral-expectations criterion of compensability for the broad principles stated in *Hynes* and *Tee-Hit-Ton*. The United States asserts that "nothing in this court's jurisprudence suggests that Indians can acquire property rights in reservation lands through prolonged occupancy." That misstates petitioners' position. Petitioners have never asserted that the compensability of a reservation can be based on the acquisition of title through prescription.

federal law. That is to say, neither respondent makes a serious argument that certiorari is not warranted in this case.

III. Conclusion

Petitioners respectfully request that respondents' arguments against the granting of the petition be rejected and that the petition be granted.

Respectfully submitted,

ROBERT S. VENNING
HELLER EHRMAN WHITE
& MCAULIFFE LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

WILLIAM C. WUNSCH
Counsel of Record
FAULKNER, SHEEHAN
& WUNSCH
351 California Street
San Francisco, CA 94104
(415) 362-6340

WILLIAM A. NORRIS
EDWARD P. LAZARUS
AKIN, GUMP, STRAUSS,
HAUER & FELD, L.L.P.
2029 Century Park East
Suite 2600
Los Angeles, CA 90067
(310) 229-1000

MARTIN S. PUTNAM
LAW OFFICE OF MARTIN
PUTNAM
484 Lake Park Avenue
Oakland, CA 94610
(510) 893-6214

Attorneys for Petitioners

DENNIS J. WHITTLESEY
JACKSON & KELLY PLC
2401 Pennsylvania Avenue, N.W.
Suite 400
Washington, DC 20037
(202) 973-0200

JOHN R. SHORDIKE
CURTIS G. BERKEY
ALEXANDER & KARSHMER
2150 Shattuck Avenue
Suite 725
Berkeley, CA 94704
(510) 841-5056